

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:12-cr-40026-WGY

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5
6 UNITED STATES OF AMERICA

7 vs.

8
9 JOHN J. O'BRIEN, et al

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13
14 For Hearing Before:
15 Judge William G. Young

16 Final Pretrial Conference

17
18 United States District Court
19 District of Massachusetts (Boston)
20 One Courthouse Way
21 Boston, Massachusetts 02210
22 Friday, May 2, 2014

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1 P R O C E E D I N G S

2 (Begins, 10:00 a.m.)

3 THE CLERK: Criminal Case 12-40026, the United
4 States of America vs. John J. O'Brien, et al.

5 THE COURT: Pay no attention to this stuff. I
6 am sitting virtually in Memphis starting at 11:00 on a
7 civil case.

8 All right. We have a lot to do and not too much
9 time to do it. I want to proceed in the following
10 order. I'm delighted to see that you now estimate that
11 the case, as I framed it, will take no more than two
12 months to try. I'm hopeful that we can reduce that
13 still further by doing some work with respect to
14 documents.

15 In one respect an issue over documents has been
16 fully briefed and I can address that, but Ms. Gaudet
17 said something about you might agree and that would save
18 some time with a witness or something, and that's about
19 the level of generality that I got the message.

20 To what is reference made?

21 MR. WYSHAK: Well, your Honor, I think we
22 submitted to the Court the exhibit list draft with the
23 agreed --

24 THE COURT: And I'm very grateful.

25 MR. WYSHAK: -- with the agreed-upon exhibits.

1 THE COURT: And they're in green?

2 MR. WYSHAK: Yes.

3 THE COURT: That's helpful.

4 MR. WYSHAK: And I think a large number of
5 exhibits come in which are from Senator Murray's office
6 which is the subject of the motion and the hearing that
7 we would like to have.

8 THE COURT: Well, I don't propose to give it a
9 hearing, but I'm prepared to rule on it. Now, put that
10 aside for a moment. Well, let's come to this.

11 As I looked at your exhibit list -- and put aside
12 anything out of the Senate President's office, many of
13 the -- oh, well, perhaps I'll -- how many of the
14 exhibits not agreed to come out of the files of the
15 Commissioner of Probation or the Probation Department of
16 the Massachusetts trial court?

17 MR. WYSHAK: I think the bulk of those
18 documents have been agreed to.

19 THE COURT: Okay, that's helpful. Well, then
20 let me face right up to it. The motion to admit the
21 exhibits from Senator Murray's office is ruled upon as
22 follows.

23 Having carefully reviewed the briefing, the Court
24 is prepared to accept that all of those documents -- and
25 I thank you for the copy of them, are authentic, they

1 are not business records. Now, perhaps some of them can
2 come in for other reasons because they are ruled
3 authentic, but they're not business records. So that
4 takes care of that.

5 What -- is that the only issue on exhibits -- the
6 only way on exhibits I can be helpful? I thought maybe
7 we could agree as to -- just take the first page here.
8 For instance, look at 1.9, "Lawton, Final Round
9 Interview Scheduled with Handwritten Scores and Ranks,"
10 and the 1.9 and 1.10. Where do those documents come
11 from?

12 MR. WYSHAK: They come from the AOTC's slash
13 OCP files.

14 THE COURT: What does that mean?

15 MR. WYSHAK: In other words it's a copy of --
16 it's actually a copy of a business record --

17 THE COURT: You're characterizing it. Where
18 did it come from?

19 MR. WYSHAK: It came from the files of OCP and
20 AOTC.

21 THE COURT: What's "OCP"?

22 MR. WYSHAK: I'm sorry, the "Office of The
23 Commissioner of Probation" and --

24 THE COURT: And what's "AOTC"?

25 MR. WYSHAK: The "Administrative Office of the

1 Trial Court."

2 THE COURT: All right. Now, as to all of
3 those types of documents, my goal here is always to
4 simplify and to shorten things down. As to those types
5 of documents in federal court now, I don't see why you
6 don't give me a packet of those documents and with an
7 appropriate certification by the custodian in the Office
8 of the Commissioner of Probation, that's their business
9 records, and then if that looks regular, in they all
10 come. The limitation being relevance. I --

11 MR. WYSHAK: I think the defendants object to
12 those particular items now because they have handwritten
13 notations on them.

14 THE COURT: And you've flagged that before?

15 MR. WYSHAK: Yes.

16 THE COURT: And -- well, I will tell you. If
17 you give me a packet of those documents with an
18 appropriate certification of an appropriate custodian
19 under the Federal Rules of Evidence in the Office of the
20 Commissioner of Probation, then the defense is going to
21 have to say that something is irregular about them. The
22 fact that they have handwritten notations within the
23 files of the Commissioner of Probation doesn't amount to
24 very much in terms of irregularity, lots of files have
25 handwritten notations. So I would suppose that I would

1 be in a position to rule that they're all admissible.

2 Now, there may be internal hearsay in a
3 handwritten notation or the like, but the likelihood is
4 you're going to get all of those in, and also you'll get
5 in all the ones from the Administrative Office of the
6 Trial Court if we have an appropriate officer giving the
7 appropriate affidavit from the Administrative Office of
8 the Trial Court. Now doesn't that make sense?

9 MR. WYSHAK: Yes, your Honor, we can make that
10 submission to the Court. The Administrative Office of
11 the Trial Court is the keeper of the records for the
12 Officer of the Commissioner of Probation, so they will
13 be able to provide that certification.

14 THE COURT: If that's true, then that's fine.

15 Let me go to the defense. Doesn't that make
16 sense? Yes, Mr. Amabile.

17 MR. AMABILE: The first thing I want to say is
18 that it doesn't make sense because I think it's going to
19 end up violating my client's right to confront his
20 accuser to let in these handwritten notes without any
21 reference or any testimony about who wrote the notes and
22 when the notes were written, the records themselves, and
23 we've stipulated to hundreds of documents --

24 THE COURT: I appreciate it.

25 MR. AMABILE: -- the typed-up records are

1 business records, the notations, it isn't clear that
2 they are and that they're regularly and usually kept in
3 the ordinary course of business.

4 THE COURT: Well -- but the affidavit of the
5 appropriate custodian should address that.

6 Now, believe me, I'm going to be assiduous in
7 protecting the constitutional rights of all parties, but
8 save for a document-by-document objection, which I'll
9 entertain if I have to, if the government gives me such
10 a list on Monday and it makes sense to me, then they're
11 all provisionally admitted so long as they come from
12 the -- those two sources. So that will save us some
13 time.

14 Now what other -- the records from the Senate
15 President's office, oh, they're authentic, I have no --
16 there's no real challenge to that, but I'm not letting
17 them in as business records. So for now they're out.

18 Mr. Sinnis?

19 MR. SINNIS: I just wanted to alert your Honor
20 to one -- before we move to different classes of
21 documents, there's documents that are in this same class
22 that your Honor has taken up which are the applications
23 and scoring sheets and files from the Office of the
24 Commissioner of Probation and from the Administrative
25 Office of the Trial Court that are housed in the

1 Williams building. There's roughly a hundred boxes that
2 the government produced in discovery that are not listed
3 here as exhibits.

4 THE COURT: Because the government doesn't
5 want them.

6 MR. SINNIS: That's correct. That we -- well,
7 there's a couple of points with those documents -- one
8 is just logistically, which I need your Honor to
9 address, and secondly is maybe more substantively, but
10 there are many documents in those files that we intend
11 to use on cross-examination, not as -- in our case in
12 chief, not as exhibits, but on cross-examination of
13 certain witnesses. So there's the physical issue of
14 making those documents available here in the courtroom
15 and there are literally 100 boxes -- a hundred boxes.

16 We can probably say, "Okay, next week" -- or every
17 Friday we're in court, "These are the range of boxes
18 that we need access to," but we need them to be
19 physically brought here by the government because we
20 have never been given unfettered access to those. Any
21 time we have gone in there to look at --

22 THE COURT: Well, please, argument is not
23 helpful, but the logistics is. That sounds like a
24 workable plan, you tell them what they're to bring over,
25 they bring it over, you have access to it.

1 MR. SINNIS: Correct.

2 THE COURT: And again I know you don't have to
3 disclose your defense here, but what I ruled for the
4 government and indeed the affidavit -- and I'll say this
5 to Mr. Wyshak and the government, the affidavit of the
6 custodian had better include all the hundred boxes so
7 that I know that I've got what the custodian says is
8 data prepared in the ordinary course of business.

9 Now, in terms of relevance, which -- fine, it's an
10 exception to the rule against hearsay, but relevance is
11 always the significant criteria, and in terms of
12 relevance, any of these hires, either within the statute
13 of limitations, which have separate counts, beyond the
14 statute of limitations, which are predicate acts, those
15 are all relevant, it seems to me. Had this case been
16 framed more narrowly, I would be disposed to allow the
17 government some leeway to show pattern and practice, but
18 since they've got so many counts, that seems to me to
19 establish a pattern or practice. So I propose to hold
20 the government to the people that they've alleged in the
21 order that I said this case would be tried.

22 Now the defense, I can see reasons to go outside
23 that, but just be aware that to the extent you go
24 outside that, the government, if it takes issue with
25 whatever is sought to be raised, has a like reason to

1 come back at you. Are there -- so that's business
2 records now from that source.

3 Are there other classes of documents that I could
4 rule on?

5 MR. WYSHAK: Your Honor, if I could just
6 address that last point because I think that, um, the
7 keeper of the records from AOTC, it is not going to be
8 able to authenticate all of the tens of thousands of
9 documents that are over in the Williams building. You
10 know, we have provided specific hiring files to AOTC
11 that they have gone back and checked to make sure that
12 those are their records, that it maintained copies of
13 everything that was produced, and they'd spent time to
14 be able to authenticate those files.

15 THE COURT: Mr. Wyshak, I appreciate that, I
16 appreciate that, and I'm not requiring them to do
17 anything beyond what they can do, and so if I drafted
18 that overbroadly, so I did. I will tell you that the
19 documents are the documents and if I rule I'll preserve
20 the defendants' confrontation rights, believe me, but if
21 I let these in under the rubric that I just described,
22 when the defense picks something out of this box, if it
23 looks like the same ilk of document, I'm going to think
24 to myself, "It's authentic," one, because that's where
25 it came from, that's where that hundreds of boxes came

1 from, and, two, "I don't see why," but you may be able
2 to point it out, "that there's some particular flaw
3 there." But the likelihood is that I'm going to admit
4 it and I'm going to admit it as a business record
5 because I've allowed you to do that. I'm not asking
6 anyone to say under oath by affidavit anything they
7 cannot say. So you can file a more limited affidavit.
8 It gets your documents in. But I'm not wasting much
9 time on admitting their documents if relevant.

10 Are there other classes of documents that I can
11 assist on?

12 MR. WYSHAK: Your Honor, I think that there
13 are a series of letters that go back and forth between
14 the CJAM, Judge Mulligan, and Mr. O'Brien that are all
15 part of Exhibit Number 40.

16 THE COURT: Thank you.

17 MR. WYSHAK: They run from 40.1 through 40.60.

18 THE COURT: So as to those, um, you're -- I'll
19 jump to it. The -- well, certainly all the letters from
20 O'Brien are admissions and your argument, I take it,
21 subject to my independent review -- and this just
22 happened in the last conspiracy case that I sat on, that
23 I didn't come out and it's a finding of fact where the
24 government came out. Now that was a different type of
25 case, but I follow *Petrozziello* and *Campaglia*, as I

1 must, and so your argument is that all the O'Brien
2 letters are statements in furtherance of the conspiracy,
3 right?

4 MR. WYSHAK: Or admissions of the defendant.

5 THE COURT: Well, if they're admissions of
6 O'Brien, they're admitted only to O'Brien.

7 MR. WYSHAK: Right.

8 THE COURT: Now, do you want me to admit them
9 without putting limiting instructions on it? If so,
10 they have to be statements made during and in
11 furtherance of the conspiracy. Is that the government's
12 position?

13 MR. WYSHAK: Yes, your Honor.

14 THE COURT: Okay, fine. So I would think,
15 subject to hearing the defense here, that if they're
16 authentic, then all of the O'Brien letters come in.

17 MR. SINNIS: The only thing I would say --
18 again some of them have kind of double hearsay in them,
19 a comment like -- it's hard -- I think you're generally
20 right that we wouldn't have an objection to them, but I
21 guess I just want to, on a rolling basis, if something
22 comes in that Mr. O'Brien is saying where "Judge so and
23 so told him something else and that's in a letter to
24 Judge Mulligan," you know, then there are some double
25 hearsay issues in some of these.

1 THE COURT: There is, Mr. Sinnis, and sort of
2 what I've put on the government with respect to your
3 documents, I take what you say in good part. I can't
4 shift the burden to you and I don't, but it's like
5 you've got to bring that to my attention because
6 otherwise they're in and I'll first vet my own findings
7 when the government closes its case.

8 MR. SINNIS: Right, and similarly -- we're
9 obviously reserving relevancy objections, but if some of
10 these letters are not relevant to the conspiracy
11 charged, I've got to be able to raise it at the time
12 that they're seeking their admission.

13 THE COURT: And that's perfectly acceptable,
14 but I'm going to have them marked as exhibits with
15 numbers, that's my point, because that will save time.

16 MR. SINNIS: Okay.

17 THE COURT: Now, how are you going to get the
18 Mulligan letters to O'Brien?

19 MR. WYSHAK: Well, most of this
20 correspondence, your Honor, involves Judge Mulligan
21 writing a letter to Mr. O'Brien or vice-versa,
22 Mr. O'Brien writing a letter to Judge Mulligan, and
23 either one of them responding to the letter. So clearly
24 this is like a conversation between Judge Mulligan and
25 Mr. O'Brien --

1 THE COURT: So you're invoking the doctrine of
2 completeness?

3 MR. WYSHAK: Yes, there's no way to give
4 context to O'Brien's letters.

5 THE COURT: But you'll accept a limiting
6 instruction on what Mulligan may have said, not for the
7 truth, but so we understand what Mr. O'Brien was
8 saying?

9 MR. WYSHAK: Yes, that's fine, because Judge
10 Mulligan will be a witness at the trial and he'd be able
11 to testify in any event.

12 THE COURT: Well, I imagine he will.

13 So with that limitation I propose that these be
14 admitted, but these, the Mulligan to O'Brien, are for
15 the limited purpose that Mulligan sent these letters.
16 (Pause.) I hear no objection. They may be so marked.

17 What else?

18 MR. WYSHAK: Your Honor, we have all these
19 sponsor lists, um, that there's a -- and those are
20 Exhibit 46 and there are -- it appears to be about 68
21 individual lists -- 67 individual lists.

22 THE COURT: Where do they come from? I mean
23 what are they?

24 MR. WYSHAK: These are lists of individuals
25 that -- the Office of the Commissioner of Probation

1 maintains lists of individuals who had made telephone
2 calls or written letters recommending candidates for
3 hiring and they made --

4 THE COURT: And these come out of the files
5 for the Commissioner of Probation?

6 MR. WYSHAK: Yes, they come out of the
7 computers of Mr. O'Brien's secretary.

8 THE COURT: So what is your ground of
9 admission?

10 MR. WYSHAK: Well, we think they're business
11 records, we also think that they're --

12 THE COURT: Well, you've got a long road to
13 hoe there, don't you?

14 MR. WYSHAK: Well, we also think these are
15 statements of O'Brien, I mean --

16 THE COURT: Yeah, I follow it.

17 MR. WYSHAK: -- his secretary is clearly his
18 agent or his employees --

19 THE COURT: For this purpose.

20 MR. WYSHAK: -- are his agents --

21 THE COURT: And then you think that's
22 admissible against all three?

23 MR. WYSHAK: Because we believe that these are
24 the equivalent of a co-conspirator statement.

25 THE COURT: I'm following.

1 MR. WYSHAK: These are the "smoking gun," so
2 to speak.

3 THE COURT: Well, I -- be very careful saying
4 that, I -- we may get the sponsor lists of court
5 officers. We'll see.

6 MR. FICK: Your Honor --

7 THE COURT: Wait a minute. Wait a minute.

8 MR. FICK: Sure.

9 THE COURT: Now, your invocation of the words
10 "smoking gun" brings them all to their feet.

11 (Laughter.)

12 THE COURT: And we'll hear Mr. Fick first.

13 Just as for accuracy -- and I'm so grateful that
14 the defense is stepping up and is not disputing over
15 trivial things, but it is true that these documents come
16 out of the secretary to Mr. O'Brien at the relevant
17 time, out of her computer?

18 MR. FICK: Some but not all, I believe, is the
19 proper answer, is the sort of 100 percent accurate
20 answer to that question. This is actually the subject
21 of a motion in limine.

22 THE COURT: I thought I was on top of them and
23 I want to get to them.

24 MR. FICK: No, I'm talking about 364, um, is
25 the motion in limine about these lists that addresses

1 the issue. I mean the principle reason why we don't
2 think they're business records is --

3 THE COURT: I don't think they're business
4 records either. He says it's co-conspirator hearsay.

5 MR. FICK: Well, I mean the fact that a
6 subordinate of Mr. O'Brien is writing things down
7 doesn't necessarily make it a statement in furtherance
8 of the conspiracy, 1, and 2, another one of these sort
9 of 403 objections to this is that these list are
10 enormous, they contain names of all kinds of people who
11 were never hired by probation, people who might have
12 been hired by probation, and to let them all in has a
13 great risk of prejudice because then the defense is in
14 the position of saying, "Well, no, not every one of
15 these people was hired under some sham process."

16 So, you know, clearly testimony about the
17 existence of references and depending whether they were
18 written down, I mean that's all fair game, but to say
19 that the documents necessarily come in, for various
20 reasons, I think is really a stretch.

21 THE COURT: Well, you know, Mr. Fick, the only
22 reason we're having this discussion now is to save time
23 having the discussion while the jury is sitting there or
24 in the afternoon of a day that I've got a jury when I
25 will be -- will have even less time than I have today

1 and I will be making evidentiary rulings and we'll be
2 stuck with them.

3 If the ones that come out of the computer -- it's
4 a reasonable inference this data, sponsor lists, was
5 kept for a reason. It passes the relevancy test. Even
6 if they weren't hired, they were keeping -- given what I
7 understand is the government's theory from the
8 indictment, it makes sense that they were keeping track
9 of those people who had sponsors and that meant
10 something.

11 I cannot now -- I'm not going to because I haven't
12 been given the actual lists, but I suppose there's a 403
13 objection, um, and so listening to your argument I'm not
14 going to admit them, and so they must be given letters,
15 as the documents from the Senate President's office, but
16 I'm taking it that these are authentic and some of them
17 come out of that computer, and that's about as far as I
18 can go, I think, today, if that saves time.

19 MR. FICK: It does. Thank you, your Honor.

20 THE COURT: All right. Mr. Bailey?

21 MR. BAILEY: Yes, Judge, thank you. Mr. Fick,
22 um, picked up on some of what I was going to say, but it
23 was just a further objection to any type of preliminary
24 ruling that the sponsor lists constitute co-conspirator
25 statements. I understand this court needs to get

1 further into the meat of this trial, I understand that,
2 but our position is that while we have never, um,
3 contested the fact that our client passed along names of
4 preferred candidates, there's absolutely no evidence
5 that she was aware of who a sponsor was, was ever told
6 someone's a sponsor or --

7 THE COURT: Here, you're making an argument
8 which will be helpful to you at some time, but not now.
9 Thank you.

10 MR. BAILEY: Thank you, your Honor.

11 THE COURT: Anything else I can do with
12 respect to documents?

13 MR. WYSHAK: Your Honor, there are -- and just
14 before we finish this last subject, I just want to
15 inform the Court that what we have done is we've created
16 a summary exhibit for all those sponsor lists, which I
17 think is Exhibit 46. So in order to -- oh, I'm sorry,
18 45.

19 THE COURT: "Master Sponsor List," you call
20 it?

21 MR. WYSHAK: Yes. So we would move to have
22 the Master Sponsor List admitted as a summary exhibit,
23 it encompasses all the information in those underlying
24 exhibits.

25 THE COURT: Well, I favor the admission of

1 evidence under Rule 1006, but the defense raises the
2 same objections, I suppose.

3 MR. FICK: And some additional ones. But I
4 mean the so-called "master list" puts column headings in
5 place, including the word "sponsor," that are not
6 present on all of the actual lists and there's a certain
7 additional prejudice argument that's covered in the
8 motion in limine as well.

9 THE COURT: Thank you. But not for today
10 then. I'm not in a position.

11 You people on both sides are doing very well, but
12 is there anything else I can do?

13 MR. WYSHAK: Yes, your Honor, there's a series
14 of documents that I believe begin around Exhibit Number
15 89, which are public records from the House of
16 Representatives, things out of the budget, roll calls on
17 budget votes, um --

18 THE COURT: And that's at least -- I'm not
19 adopting your theory, but that you would say that's
20 confirmation that this scheme was paying off?

21 MR. WYSHAK: Yes.

22 THE COURT: All right. I understand that.
23 And they start at, you said -- yes, at 89?

24 MR. WYSHAK: And I think they went through
25 approximately 102.5.

1 THE COURT: Right. Why aren't those all, you
2 know, quintessential records of the legislature, the
3 great general -- what's it called, "The Great and
4 General Court"?

5 MR. SINNIS: I think we have basically
6 relevance objections to most of those, your Honor, as
7 well as some are really snippets that are, you know,
8 just extracted from what I believe is a broader record,
9 so again I would have some completeness issues, but also
10 relevancy issues to those would be the main objections
11 that we were lodging for those.

12 THE COURT: Okay, thank you. I'm going to say
13 that I'm going to admit them all subject to your
14 relevancy objection and if, um, I'm persuaded of it -- I
15 would hope when they make objections as to completeness,
16 unless what the defense says is complete absolutely
17 submerges what is relevant, that these are all admitted
18 subject to a relevancy objection. And that takes us
19 from 89 through, um, 102.5.

20 Anything else?

21 MR. BAILEY: Judge, just as -- more in the way
22 of -- and I apologize for the colloquialism, of a
23 "heads-up," I don't think there's a contest issue in
24 terms of our client's Ware testimony, but that is likely
25 going to be subject to a possible completeness request

1 by Ms. Tavares's table and I just want to let the Court
2 know that at this point.

3 THE COURT: Well, you have a motion in limine
4 there.

5 MR. BAILEY: Yes.

6 THE COURT: All right. Now let me --

7 MR. AMABILE: Your Honor, similarly with
8 Mr. Burke, we've been working on preparing our own, what
9 we would propose, to get the government informed about
10 that. They've indicated to us that they don't intend to
11 introduce that in the early part of the trial so we've
12 been working on a variety of other things. So we don't
13 generically object obviously to the admission of a
14 portion of his statement, but the one that they've
15 marked we do object to and we're preparing a proposal
16 that would, um -- that we view would be appropriate in
17 this circumstance.

18 THE COURT: Thank you. The next thing I want
19 to -- this is helpful. The next thing I want to do is
20 address certain of the motions in limine. I don't
21 propose to hold hearings on them. I'm not in a position
22 to make final rulings as to some, but as to others, I
23 am. And so let me address that now.

24 First I'm going to deal with the government's
25 motion in limine to preclude the presentation of

1 evidence, cross-examination, or argument regarding
2 certain subjects. It's a rather broad motion. The
3 defense has objected to it.

4 There are five areas and I'll deal with each one.
5 They claim that Mr. O'Brien had exclusive hiring
6 authority, the claim that the probation department was
7 not part of the trial court, um, and we'll start with
8 those two.

9 Those are mixed questions of fact and law. They
10 are -- I'm not prepared to address them now, but I will
11 tell you that my present thinking -- and that's all I'm
12 going to say, my present thinking is that the, um -- is
13 that it's unlikely under the law that he had sole and
14 exclusive hiring authority, and so the defense may be
15 out on a limb making that contention.

16 Second, I think that the claim that the Probation
17 Department was not part of the trial court is even
18 thinner. The question about whether it's subject to the
19 trial court policies and procedures manual is -- well,
20 that has factual aspects to it and of course those are
21 for the jury, but it seems pretty clear to this court
22 that, um, as a matter of law, the Probation Department
23 was part of the trial court within the judicial branch
24 of Massachusetts.

25 Subject matter three, that the certification was

1 not false. I mean that's a question of fact and so to
2 that extent the government's motion is denied.

3 And this business about bringing up lists of
4 recommendations for Court Officer positions. I make no
5 ruling on that, but again in an attempt to be helpful,
6 um, one of the issues that I do see here is whether the
7 Chief Justice for Administration was having the wool
8 pulled over his eyes, and if at the same time that
9 Mr. O'Brien is supposed to have been doing what he was
10 doing with others, um, the trial court itself was doing
11 much the same thing. I take no position, but that seems
12 to be the defenses' position. But with respect to Court
13 Officers, no, I think that's fair game because it goes
14 to the issue of reliance, was -- if in fact the Chief
15 Justice for Administration was the administrative
16 superior of the Commissioner of Probation, as it appears
17 as a matter of law to me he was, but we'll see, then his
18 reliance on these certifications that are alleged to be
19 false, um, will involve what his other agents were doing
20 and what he knew they were doing, if they were doing
21 anything.

22 So we got into this, the subpoenas which I
23 denied, and that's of course after Mr. O'Brien's gone
24 and after the law changed and therefore I don't think
25 we're going to get into any of that. But anything at

1 the same time seems to this court -- anything at the
2 same time by the office of which the Chief Justice for
3 Administration headed, um, I think we may get into.

4 The mere fact that a politician, a judge, or other
5 individual provided a letter of recommendation, served
6 as a reference, um, to the extent the government wants
7 to keep that out, that's denied.

8 The motion for 15 additional minutes for O'Brien's
9 opening statement is denied. You share the time as you
10 see fit.

11 And the government's motion, I've dealt with that,
12 with the Senate President's office.

13 The motion to compel compliance with Local Rule
14 116(2)(b), 2(e), and (f), that's allowed. This has to
15 be broken down by the government and I expect it to be
16 done.

17 MR. WYSHAK: Well, your Honor, if I may
18 address that for a moment?

19 THE COURT: Very briefly. I don't intend to
20 hold hearings on things you don't like, and I say that
21 to everybody, but I'll hear you briefly.

22 MR. WYSHAK: I mean we've advised the
23 defendants, if it wasn't obvious from the discovery that
24 was produced, that there are no known prosecutable
25 federal offenses regarding any of the government's

1 witnesses, except for those witnesses who participated
2 in the scheme which is the subject matter of this
3 prosecution, and we've given them lists of the people
4 who did so.

5 THE COURT: And have you broken it down
6 witness by witness? That seems to be their objection.

7 MR. WYSHAK: Well, that seems quite
8 nonsensical.

9 THE COURT: That's what the rule requires,
10 Mr. Wyshak.

11 MR. WYSHAK: Well, I think the rule requires
12 that we provide them with the information.

13 THE COURT: I think not. Witness by witness.
14 That's the Court's order.

15 All right. Exclude reference to the Boston Globe
16 investigation. A defense motion. That's generally
17 allowed. That may have to come up, but it's certainly
18 not relevant in itself. So that motion is allowed.

19 Exclude reference to the so-called "Ware
20 investigation" and report. I'm not admitting -- I'm
21 certainly not admitting the report, and I don't know
22 that the government would suggest it would be admitted
23 under 8038, but we're certainly going to have reference
24 to it because testimony before the Ware investigation is
25 germane to this case. So the motion is allowed in part

1 because I'm not -- to the extent I'm not admitting the
2 report, but the fact of the investigation may come up.
3 So to that extent it's denied.

4 MR. AMABILE: Your Honor, could I just -- I
5 know your Honor wants to --

6 THE COURT: Yeah.

7 MR. AMABILE: The fact of the investigation I
8 don't think needs to come up and shouldn't come up
9 because it can be referred to and to the extent somebody
10 testifies in a prior proceeding just in the same way
11 that a retrial would and bringing up that there was some
12 kind of so-called "independent investigation" is going
13 to create an inference that there was a conclusion made
14 that was adverse to the clients.

15 THE COURT: When you characterize it your way,
16 Mr. Amabile, that makes some sense. We'll have to take
17 it on a question-by-question basis. My ruling is
18 intended to give guidance.

19 For instance, I'm now addressing defendant
20 Tavares's motion in limine to allow evidence regarding
21 an out-of-court conversation. I'm disposed to allow
22 that motion because that does appear to be a statement
23 of her then present intention. And so I don't think we
24 ought to refer to it as some sort of "independent
25 investigation," but it may have to come up. And that's

1 about all I could say on that.

2 Now, those are the motions in limine that I have
3 before me. Yeah, that doesn't -- and, you know,
4 Mr. Fick, I'm not saying there aren't others --

5 MR. FICK: Okay.

6 THE COURT: It's my own error, but those are
7 the ones -- Oh, no, I have two others and they're
8 Mr. Amabile's, and I mean no disrespect to him, but
9 these -- your motions regarding rumors and hearsay
10 relating to hiring, um, rumors and hearsay relating to
11 legislative action, well, at this level of generality
12 the motions are allowed, but it doesn't mean much. I'm
13 not going to allow rumors. I'm not going to allow
14 hearsay, um, unless of course I have a particular
15 exception in a particular situation. So I'm not
16 forbidding the government from anything here.

17 Now that's all I have before me.

18 MR. WYSHAK: Well, your Honor, if I might just
19 address one point --

20 THE COURT: One point.

21 MR. WYSHAK: -- on the government's motion
22 regarding precluding the defendants from addressing
23 certain subjects which we thought were matters of the
24 law and have been decided by Judge Saylor. I think on
25 the third claim there that -- we agree that the ultimate

1 issue of whether or not the certifications were false is
2 an issue for the jury, however I think what we were
3 seeking was the defendant's contention during the motion
4 to dismiss the indictment litigation that, um, the
5 personnel standards to which, um, Mr. O'Brien was making
6 a certification did not include the standard that he
7 hire the most qualified candidate, and Judge Saylor
8 ruled as a matter of law that that standard is part of
9 this certification. So that's what we were moving to
10 preclude them from arguing to the jury, that when he
11 certifies he's not certifying that it's the most
12 qualified candidate.

13 THE COURT: I have carefully reviewed Judge
14 Saylor's decision, it is of course law of the case, I've
15 indicated that, but law of the case is subject to
16 revision by the judge who bears the ultimate
17 responsibility. Now that's me. I don't see any reason
18 to revisit that aspect of his decision or any other, as
19 it's been presented to me, at all. In fact, I agree
20 with it wholeheartedly. I'm not clear at this juncture
21 -- and that's what I was trying to say. It seems to me
22 that it's pretty clear as a matter of law that these
23 personnel standards of the trial court do govern and
24 also it's pretty clear as a matter of law that the
25 language themselves requires the hiring of the best

1 qualified candidate. Now, having said that, if that's
2 what you were hoping to hear from me --

3 MR. WYSHAK: Yes.

4 THE COURT: Thank you. And I have no
5 hesitancy in saying that. I think Judge Saylor was
6 absolutely correct. I don't sit in review of anything
7 he's done. But I'll be very clear, I adopt it, and
8 completely.

9 And having said that though, Mr. Amabile, on
10 behalf of all the defendants, makes a good point. This
11 case is a criminal case. They can make arguments. I'm
12 not going to foreclose them from making arguments. I
13 will discharge my duty of teaching the law and I will
14 emphasize that they must take the law from me. That's
15 different than saying "You can't argue this," "You can't
16 argue that." I'm trying to give people appropriate
17 guidance.

18 MR. WYSHAK: And one other thing, your Honor?
19 If something is a matter of law, they should not be
20 arguing it to the jury as a matter of fact and that's
21 our concern.

22 THE COURT: I stated that at that level of
23 generality, I agree.

24 I want to get on to the jury questionnaire and the
25 procedures we're going to follow.

1 MR. WYSHAK: There is one more, your Honor.

2 THE COURT: All right, briefly, because I'm
3 stopping to virtually go to Memphis at about 5 minutes
4 to 10:00.

5 MR. WYSHAK: I just want to bring it to the
6 Court's attention that we did make a motion in limine to
7 admit the Bucci voicemails.

8 THE COURT: I have not myself reviewed it.
9 I'll go back and I'll be sure to do that. But I do know
10 what those are. You referred to them before,
11 Mr. Wyshak, and I thank you.

12 Yes?

13 MR. FICK: Docket Number 357 is that motion
14 and the government has responded. There is one more,
15 Docket 365, which is a motion in limine about the
16 criminal record or supposed criminal record of one of
17 the charged hires in the government's case. So those
18 are two other motions that are out there.

19 THE COURT: I appreciate it.

20 Let me talk now about the questionnaire. I'm
21 going to give you copies of my revision to the
22 questionnaire when we recess. I have severely edited
23 them, they go well beyond what I expected, but I have
24 asked a number of these questions and in the forms to
25 which you agree. I do want -- and this is tentative

1 only.

2 I was just told this morning of a revision in the
3 proposed witness list. I've incorporated that. You
4 will take this as a draft and the reason you're going to
5 take this as a draft is that I have not had sufficient
6 time to talk with our Jury Commissioner over this and I
7 want to. But with that said, here's how we're going to
8 proceed over the next few days.

9 Now, Monday morning -- um, I'll settle on the
10 questionnaire later on today after I've done my
11 jury-waive trial. Later on today I'll meet with the
12 Jury Commissioner. I'll finally settle on the
13 questionnaire. You'll all get copies and you'll get
14 copies of this draft when we leave here this morning.

15 I'd like you here before 9:00, say about quarter
16 of 9:00 here in this courtroom on Monday morning.
17 Ms. Gaudet will gather you and we'll all go down to the
18 jury lounge. The Court Reporter will be there. I will
19 greet the jurors. I will, um, give my normal greeting
20 to them about the importance of their duties. I will
21 say that the jury selection in this case will proceed in
22 two phases and the first one will be to fill out this
23 questionnaire. I will make mention of the length of the
24 trial. I will make mention of the fact that there has
25 been mention of the trial in the media and that we have

1 questions directed to that. And once having done that,
2 we will adjourn and we will leave the administration of
3 the questionnaire in the hands of the Jury
4 Commissioner.

5 I propose that we adjourn back up here because I
6 may be able to rule on these additional motions, and as
7 Mr. Amabile says, there may be more motions to come.

8 As soon as the questionnaire has been administered
9 and copies made, copies will be delivered to all of you.

10 One of the -- I won't say "flaws," but one of the
11 aspects of a two-step jury, um, impanelment is that you
12 both are enabled to do juror research. I'm not
13 forbidding that nor encouraging it. I do say that you
14 must exchange the actual, um, screen shots or references
15 to such screen shots if you do that research. Be very
16 clear that you've got to exchange that. So you people
17 will stay up late that night and I propose that you make
18 these exchanges by 8:30 -- well, I should say the
19 timing.

20 Mr. Amabile, I know we have our deal and you
21 worked it into the questionnaire and I'm going to
22 conform to it, but not the first day, I need you here
23 Monday.

24 MR. AMABILE: No, I plan to be here. I would
25 also ask -- and I don't mean to interrupt, but if we

1 could convene at 8:30 because after we've reviewed your
2 draft I think there may be a need to put some objections
3 on the record.

4 THE COURT: Oh, I propose to do the following,
5 though of course you may put objections, although I
6 don't think we need to start making them at 8:30 nor do
7 I need to be here. I'm going to file in the record your
8 original draft with my notations on it so your rights
9 are saved as to anything -- all parties, anything I've
10 cut out of the draft you submitted, your rights are
11 saved.

12 So now we're at 8:30 on Tuesday morning, you've
13 exchanged what data you have, and if you jointly agree
14 that a juror should be excused, I'd like you to prepare
15 -- you can note on the jury list just the ones you
16 jointly all agree that a juror ought to be excused. I
17 will be reviewing them myself and I'll make my own
18 determinations as to what jurors should be excused.

19 Then we will meet commencing at 9:30 on Tuesday
20 morning to talk -- not in the presence of the jury, but
21 in open court, to talk about challenges for cause. I
22 propose to excuse all the jurors that I note and to the
23 extent your joint list is different than mine, I propose
24 -- assuming I think I have enough jurors to go forward,
25 to excuse the ones you jointly want excused.

1 With that done I propose -- the jury list will be
2 the order in which they'll be impaneled, so I will
3 say -- and we'll have to work this out, but you're all
4 cooperating very well and I appreciate it, so I'll say,
5 "Any challenges to the first 10?" "To the first 20?"
6 And then I can conceive of three categories. One, I
7 accept your challenge and excuse a juror; I reject it
8 and declare the juror indifferent; or as may very well
9 be the case, I'll need to inquire further, that a juror
10 will say something about their inability to serve but
11 I'll want to hang onto them. I'm not just putting them
12 in the box. A juror will say something about a
13 familiarity with the case, but I'm not satisfied that
14 that suggests bias and I'll want to know whether the
15 juror can put that to one side and adjudicate the case
16 on the merits of the evidence.

17 So the three categories are excused, not excused,
18 or ask, and I'll ask.

19 We'll take the morning and go through those and
20 I'll make my rulings. And so the jurors that remain,
21 I've not declared indifferent, but at least we have an
22 idea of who we need to inquire of further. And
23 Wednesday morning -- we'll call those jurors all in on
24 Tuesday night. Wednesday morning, impanelment with --
25 if you've impaneled before me, there'll be one

1 significant change, so you understand it.

2 The venire comes in and we've got lots of them
3 here and at that time I'm going to ask a few questions,
4 one, and that's the time where I'm going to introduce
5 you personally and you stand before the jury and who you
6 are and where your offices are and I will then yet
7 again, after the jurors have had any -- had a chance to
8 think about it, I will ask specifically, "Has anyone
9 been employed by" -- because the questions don't really
10 get to that, "by the U.S. Attorney's Office, by the
11 Federal Defender's Office, by the law firms, in
12 litigation with those offices," "sensible of any bias or
13 prejudice," and the like, and I'll do that with the
14 venire as a whole and I'll say, "Raise your hands if you
15 do." And you're all familiar with that. You can be
16 watching.

17 Then what we'll do, when we're set, is -- after
18 I've asked those questions, then we will begin the
19 impanelment and instead of filling the box we'll simply
20 take Juror Number 1, if Juror Number 1 remains, or Juror
21 Number 15, if that's the first person on the list, and
22 the Clerk will call out, "Juror Number 7," the name, and
23 instead of having them go to the box, they'll come over
24 to my left, the sidebar with the Court Reporter, I will
25 inquire of the juror further, I will either excuse the

1 juror or declare the juror indifferent. If the juror is
2 indifferent -- and the juror will step away, then you
3 may exercise a challenge, if you want, and I will rule
4 on your challenge. But the juror will get in the box
5 and we'll fill the box until we have 16. Then I'll stop
6 and we will have challenges.

7 The government has 8. The defense has 12. The
8 government will go first. There won't be any back
9 strikes. When the government's gone, the defense will
10 go. All those jurors will be excused. The last four
11 jurors chosen will be the alternates. You can use your
12 challenges as you see fit.

13 So let's say 6 jurors are excused and we have 10
14 jurors sitting there. So we'll follow the same
15 procedure going along until I fill the box with those
16 6. Then as to those 6, the challenges will be
17 exercised, only this time because we have to be
18 even-handed the defense will go first and they'll
19 challenge, the government would challenge, et cetera,
20 until I have 16. When I have 16, I'll decide the
21 foreperson. We'll take a recess. Bring them back.
22 Swear them. The case will begin.

23 I must go to my jury-waived case and we'll meet
24 again -- I'm going to take a recess now but Ms. Gaudet
25 will give you the draft jury questionnaire. I thought I

1 saw the Jury Commissioner here in the courtroom. Is he
2 here? Oh, yes, he is. I'm going to meet with him
3 briefly right now.

4 (Pause.)

5 THE COURT: Ms. Gaudet is always so helpful
6 and also far more skilled than I, but we'll give you a
7 disk of all these questionnaires. You're facile with
8 that. That will be provided to you.

9 But I need to talk to the Jury Commissioner now.
10 I thank you. We'll recess.

11 (Adjourned, 11:00 a.m.)

12

13 C E R T I F I C A T E

14

15 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
16 do hereby certify that the foregoing record is a true
17 and accurate transcription of my stenographic notes,
18 before Judge William G. Young, on Friday, May 2, 2014,
19 to the best of my skill and ability.

20

21

22

23 /s/ Richard H. Romanow 05-06-14

24 _____
RICHARD H. ROMANOW Date

25